

**TRIBAL RESERVED FISHING RIGHTS AND WATER QUALITY STANDARDS
BRIEFING FOR MATT LEOPOLD: KEY ISSUES
APRIL 4, 2018**

OUTLINE OF BRIEFING:

- **CHRONOLOGY OF EPA’S CONSIDERATION OF INDIAN TREATY RIGHTS AND WQS**
- **DOI’S 2015 LEGAL OPINION**
 - **OVERVIEW OF OPINION**
 - **IMPLICATIONS FOR ANY CHANGE**
- **TREATY FISHING RIGHTS IN WA/ID**
- **CWA ELEMENTS OF EPA’S DECISIONS**
- **STATUS OF WQS MATTERS IN ME, WA, AND ID**

CHRONOLOGY OF EPA’S CONSIDERATION OF INDIAN TREATY RIGHTS AND WQS

- **Ex. 5 DPP / ACP / AWP**
- **2013:** Maine sues EPA to compel action on the state’s WQS as they apply to tribal waters in Maine. EPA agrees that the Maine Indian settlement acts grant the state authority to apply state WQS to waters in the tribes’ reservations and trust lands in Maine. The acts also reserve to the tribes the right to take fish for their “individual sustenance” in their reservations and trust lands.

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- **2014:** Tribes nationwide repeatedly press EPA to address the open question, including at meetings of the National Tribal Operations Committee (a senior leadership-level EPA/tribal liaison group) and in Regional consultations. Administrator McCarthy issues a memorandum acknowledging that EPA must ensure that its actions do not conflict with tribal treaty rights.
- **2015 IN MAINE:** In response to Maine’s suit, EPA commits to the District Court to act by January 2015. On February 2, 2015, EPA approved most of Maine’s WQS as they apply to tribal waters and also approved a designated use in the tribal waters for sustenance fishing. EPA disapproves those state human health criteria that are derived using a fish consumption rate that is not representative of tribal sustenance consumption. This is the first action on the record articulating EPA’s approach to reserved tribal rights and state WQS review.
- **2015 IN WASHINGTON:** EPA proposes federal toxics human health criteria in Washington that apply to the tribes’ subsistence fishing right in ceded territories across the state.
- **2015 IN IDAHO:** EPA submits several comment letters to the state outlining concerns about the state’s proposed WQS based on the framework articulated in the Maine decision and Washington proposal.

DEPARTMENT OF INTERIOR'S 2015 LEGAL OPINION

- **OVERVIEW OF OPINION**

- As part of EPA's review of Maine's proposal to implement WQS in tribal waters, EPA sought an opinion from DOI's Office of the Solicitor (DOI Opinion). EPA specifically asked for DOI's counsel on the nature and extent of tribal fishing rights and the relationship between such rights and water quality.
- DOI concluded that all four tribes in Maine have "federally-protected tribal fishing rights." The source of the fishing rights and the extent of permissible state regulation of such rights varies from tribe to tribe.
- DOI provided a survey of case law in which courts held tribal fishing rights to encompass subsidiary rights necessary to render the rights meaningful. Based on this analysis, DOI concluded that "fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right."
- DOI concluded that the fishing rights of the tribes in Maine "would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for the sustenance."

- **IMPLICATIONS FOR ANY CHANGE**

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TREATY FISHING RIGHTS IN WA/ID

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CWA ELEMENTS OF EPA'S DECISIONS

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